United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2010 Original

To be argued by
ARLENE R. SILVERMAN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 75-2010

UNITED STATES ex rel. NANCY ROSNER,
on behalf of FRANK CIAPPETTA,

Appellant,

-against-

WARDEN, Sing Sing Prison, Ossining,
New York,

Appellee.

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Question Presented

May petitioner attack his conviction on the ground that his attorney expressed an opinion that there was a possibility that he might receive a five year reformatory term upon his plea of guilty to murder in the second degree where petitioner admitted and a state judge found at a coram nobis hearing that petitioner understood that he faced a twenty year to

life term, that he realized that the five year reformatory term was merely a sentence possibility and where the circumstances surrounding the plea compel the conclusion that petitioner did not regard the five year term as a serious sentence alternative?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, dated October 1, 1974 (Motley, J.) denying petitioner's application for a writ of habeas corpus. On December 20, 1974, the District Court granted petitioner's application for a certificate of probable cause.

Background

On June 15, 1954, defendant Frank Ciappetta, together with Vincent Guglielmelli, Philip Bonanno, Jerry Santaniello and Frank Giampetruzzi, were jointly indicted by the Grand Jury of Bronx County for the crime of murder in the first degree.

At about noon on June 1, 1954, the aforementioned Bonanno, Santaniello and Giampetruzzi, and about three or four other members of the "Red Wings", a teenage gang from 116th Street and Second Avenue, New York County, were at Orchard Beach. They became involved in an argument with another teenage group known as the"Fordham Baldies".*

Defendants Bonanno, Santiello and Giampetruzzi sought revenge for the insults they had received at Orchard Beach. Upon their return to Harlem, they sought out the other two defendants, Frank Ciappetta and Vincent Guglielmelli. The five defendants thereupon returned in a car, owned and operated by Giampetruzzi, to Orchard Beach in order to hunt for the members of the "Baldies". Ciappetta and Guglielmelli each had with them fully loaded automatic pistols.

Unable to find the "Baldies" at Orchard Beach, the defendants drove to a candy store at 2481 Belmont Avenue, where, they had been informed, the "Baldies" "hung out". They arrived there at about 4:55 p.m., on June 1, 1954. Angelo DiVincenzo and Bernard Caleo were seated on a stoop in front of the candy store. Ernest Monturro was seated inside the store drinking a soda.

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* A copy of the trial minutes are submitted as an exhibit herewith.

In response to an inquiry as to whether they were the "Fordham Baldies", DiVincenzo, Caleo and Monturro walked towards the double parked automobile. When the three reached the curb some of the occupants of Giampetruzzi's car said, "You called us punks". Immediately two guns were produced, and about six shots were fired. The defendants then sped away in the car.

Monturro, who was not a member of the Baldies, died a few minutes later from a gunshot wound. Caleo received a gunshot wound which necessitated the amputation of his right leg above the knee. DiVicenzo was struck by a bullet which pierced through his left arm.

Within a week the police apprehended the defendants. All five of them made statements to the police and to an Assistant District Attorney. These statements substantially admitted the foregoing facts.* Ciapetta and Guglielmelli stated that they had used the guns in the shooting.

According to the report of the ballistics experts, the fatal bullet had been fired by defendant Ciappetta. The bullet that wounded Caleo, requiring the amputation of his leg, had been fired by defendant Guglielmelli.

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* A copy of Ciappetta's statement is included in the record on appeal.

All five defendants pleaded not guilty and proceeded to trial. After the trial had been in progress for two weeks, Ciapetta, as well as the other defendants, withdrew his plea of not guilty. Ciappetta was permitted to dispose of the indictment by entering a plea of guilty to the crime of murder in the second degree. This plea was entered on May 2, 1955. On June 24, 1955, defendant was sentenced to a term of from 20 years to a maximum of his natural life. No appeal was ever taken from this conviction.

On August 31, 1955, defendant brought on a motion, in the nature of a writ of error coram nobis, seeking to vacate the judgment of conviction. The basic ground asserted upon this application was that defendant had entered his plea of guilty based upon an official promise that he would receive a reformatory sentence having a maximum of 5 years. A hearing was held with reference to this application on November 4, 1955.

Shortly prior to the time that Ciappetta made this application, his co-defendant, Guglielmelli, made a similar application. A hearing was conducted on his application together with Ciappetta's.

At the hearing, full inquiry was made into all of the circumstances surrounding the pleas entered by both defendants Ciappetta and Guglielmelli. The testimony of their retained trial counsel, Stephen A. Fuschino, Esq., clearly established that the only information he had ever conveyed to either defendant, or their respective families, was that the defendants had the opportunity to dispose of the indictment by pleading guilty to the crime of murder in the second degree, and that, in his opinion, under such a plea, the possibility existed that one or both defendants might receive a reformatory sentence having a maximum of 5 years. He also made them aware of the possibility that they could receive a sentence of 20 years to life (C.N. pp. 3-29).*

Mr. Fuschino denied that he had ever conveyed any express or implied communication that the trial judge was inclined to sentence defendants to a reformatory term, if they would plead guilty to murder in the second degree. The testimony of Fuschino clarifies that a reformatory sentence was at all times discussed only as a possibility.

* Page references are to minutes of Coram Nobis Hearing, unless otherwise indicated.

The significance of a letter written to Judge Schulz by the Director of the Elmira Reception Center was fully clarified. This letter had been sent to the Judge as a result of a letter sent to the Director by Assistant District Attorney Lee inquiring as to the legality of a sentence under the New York Penal Law upon a conviction for murder in the second degree. Mr. Lee had sent this letter at the behest of Mr. Fuschino for the purpose of satisfying Fuschino's desire to learn if such a sentence was legal.

The response of the Director was equivocal. Judge Schulz showed counsel the letter and indicated to him that he was not satisfied that such a sentence was legal. Counsel for defendants was trying to convince the Court to consider rendering such a sentence.

Mr. Fuschino had the letter during a recess. In discussing the possibility that one of the defendants might get a reformatory sentence if convicted of murder in the second degree, counsel showed the letter to Guglielmelli's parents. The letter was <u>never</u> shown to Ciappetta although he alleges that he later heard of its existence.

Fuschino's part in the pre-pleading proceedings is best summarized by the following testimony which he gave at the coram nobis hearing (C.N. pp. 26-27):

> "Q. Do you remember whether or not at any time after the trial commenced and in the various discussions with the Ciappettas and the Guglielmellis, that you indicated Mrs. and Mr. Ciapetta or the defendant Frank Ciappetta that there was a possibility of his being sent to the Elmira Reception Center?
> A. That, in other words, I have reference strictly now to Ciappetta.
> A. Yes.
> Q. He also was informed that there was a possibility of being sent to Elmira?
> A. He could get 20 years to life to [sic] be sent to Elmira.
> The Court: You stated that as your opinion?
> The Witness: Yes; I had told them I felt, in my opinion, taking everything into consideration, that there might be a possibility they would receive this sentence." (Emphasis added.)

The testimony of Ciappetta at the coram nobis hearing clearly refutes his present claim. Defendant's testimony unequivocally shows that at the time he decided to enter a plea of guilty to the crime of murder in the second degree, he was fully cognizant of the fact that he was subject to receiving a sentence of 20 years to life, and that no more than a

possibility existed that he might receive a reformatory sentence having a maximum of 5 years.

At the hearing held with reference to defendant's claim, Ciappetta testified, upon direct examination, as follows (C.N. p. 48):

> "Q. Did you talk to your parents about it?
> A. Yes, sir.
> Q. And, well, what did your parents, your mother and father tell you regarding the taking of the plea or any recommendations they had?
> A. Well, they told me, they says -- no, it was after I took the plea, they said that, 'You might get the five years,' something like that." (Emphasis supplied)

Defendant's mother, Bessie Ciappetta, testified at the hearing as follows (S.M. p. 54):

> "Q. I mean, did you have to talk him into taking the plea?
> A. No; I left it up to him, and he, and he took it."

Based upon the testimony adduced at the 1955 hearing, the County Court on December 6, 1955, denied the application of both Guglielmelli and Ciappetta. The Court found that the petitioner pleaded guilty on the representation that there was only a possibility of his receiving a reformatory sentence. The Court held that a prediction by counsel as to the length of

imprisonment, even if erroneous, formed no basis for coram nobis relief. Petitioner filed a notice of appeal from this order. However, the appeal was never perfected and on May 16, 1957, was dismissed for lack of prosecution.*

On April 18, 1960, defendant brought on a second motion, in the nature of a writ of error coram nobis, seeking to vacate the judgment of conviction rendered against him. He again based his application on an assertion that "he believed he would be sentenced under the provisions of Section 2184-a of the Penal Law." Defendant did not offer any new fact or evidence with reference to this claim.**

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* Petitioner alleged in the District Court that he had met the exhaustion requirement of 28 USC 2254(b) since his attorney and the Bronx County District Attorney had agreed to be bound by the outcome of the appeal of his co-defendant, Vincent Guglielmelli. However, the Appellate Division treated the affidavit of his attorney setting forth such an agreement as a request for an extension and when no brief was filed, dismissed petitioner's appeal (A 56). Accordingly, the merits of petitioner's claim has never been ruled upon by the Appellate New York Courts.

** Ciappetta advanced a further ground for his 1960 application, an allegation that his rights were violated in that his attorney had not given Ciappetta's case counsel's "undivided" attention. This claim is based solely upon the fact that defendant's attorney also represented his co-defendant Guglielmelli. This claim is not urged here.

Defendant's motion was denied on April 18, 1960 Judge Schulz found that petitioner had already been accorded a hearing on his allegations and that that application had been denied on December 6, 1955. No appeal was taken from that order. The Court held that in view thereof, there was no need for a second hearing on an issue already disposed of, and the Court, thus, declined to review the merits of petitioner's second application. This order was affirmed by the Appellate Division, First Department on October 23, 1962.

Opinion Below

With respect to the requirement of 28 U.S.C. 2254(b) that a petitioner exhaust his State remedies before raising a constitutional claim in the Federal District Court, Judge Motley held that the Court was satisfied that the State courts had had a fair opportunity to decide the issue presented. Judge Motley observed that petitioner and his co-defendant Guglielmelli were both represented by the same trial counsel and that it was the constitutional significance of trial counsel's advice given to both defendants which was at issue in Guglielmelli's proceedings.

Considering the merits of petitioner's claim, Judge Motley rejected his argument that his plea was involuntarily entered. The District Court found that petitioner appreciated

the fact that he faced a term of from twenty years to life upon his plea of guilty to murder in the second degree. The Court held that petitioner's claim was most analogous to a prediction case and, as such, counsel's representation was not so inept as to amount to a breach of his duty to represent his client's interests. The application was denied.

ARGUMENT

AN ERRONEOUS SENTENCE PREDICTION BY COUNSEL DOES NOT RENDER A GUILTY PLEA INVALID.

Faced with a possible federal gun charge conviction in the District Court, based, in part, on a felony conviction in Bronx County, petitioner, at the eleventh hour, resurrected an attack on that Bronx County conviction in 1955 for murder in the second degree.* Petitioner raised a twenty year old claim, in the District Court for the first time, that his plea was unknowningly and involuntarily entered because his attorney who had fully apprised him that he faced a twenty year to life

* On December 16, 1974, petitioner pleaded guilty to the crime of making a false or fictitious statement with regard to the acquisition of a firearm, 18 U.S.C. 922(a)(6), in the United States District Court for the Southern District of New York (Motley, J.) 74 Civ. 361. Having pleaded guilty to one count of a two count indictment, petitioner was sentenced to three months.

term on his plea to the murder charge also expressed his opinion that there was a possibility that petitioner could receive a five year reformatory term. *

However, contrary to petitioner's claims here, the record clearly indicates that petitioner fully appreciated that his plea to murder in the second degree exposed him to the twenty year to life term, that he never seriously entertained any thought of receiving a five year reformatory term, and that far from pleading in the expectation of receiving such a five year term, petitioner pleaded guilty because he had confessed to the unprovoked and premeditated murder of Ernest Monturro and his participation in the attack at the candy store** and he

* Petitioner does not dispute in this Court that he was informed that his plea to murder in the second degree exposed him to a penalty of 20 years to life. Moreover, after a full hearing in the New York Courts, Judge Schulz found that the five year term was only mentioned as a sentence possibility by petitioner's attorney. This finding is presumptively correct here. 28 U.S.C. 2254(d).

** Stenographic statement of petitioner's admissions to the District Attorney is included in the record on appeal.

expressly wished to avoid the death penalty he faced upon conviction after trial of murder in the first degree. Shortly after his arrest, petitioner in a statement to the Assistant District Attorney assigned to the investigation, admitted going to Orchard Beach with several other boys. He admitted having a 25 caliber gun and firing three shots at three boys near Piggie's candy store. He told the Assistant District Attorney where he had hidden the gun which was later retrieved. Petitioner's conviction was thus a certainty.

Aside from the strength of the People's case, petitioner's claim that he expected the five year term is further belied by the circumstances surrounding the plea. Thus, after the offer of murder in the second degree, petitioner's trial counsel, nonetheless, attempted to negotiate for a further reduction of the charge to manslaughter in the first degree (C.N. pp. 9-10). If petitioner were, in fact, to be sentenced to the five year term, such a further reduction would have been unnecessary since petitioner could receive no further sentence benefit by such a move.

And perhaps even more significantly, petitioner and his co-defendant proceeded to trial on the indictment and did not even accept the murder in the second degree offer until

well after the trial had begun, the jury having been selected and the People having called several of their witnesses. In short, petitioner was obviously reluctant to take the plea, appreciating the severity of the sentence he faced, and it was only when the trial began and petitioner realized that it was twenty to life or possible death and that the District Attorney was holding firm and not offering any lesser plea that he finally reached his decision to plead guilty.

Moreover, Ciappetta, himself, at the coram nobis hearing confirmed these reasons for his plea stating that at the time he entered his plea, he harbored no more than a hope that the possibility of a reformatory sentence would be realized (C.N. P. 48).

The fact that Mr. Fuschino expressed his opinion that a five year reformatory sentence was a possibility does not void petitioner's plea since petitioner undeniably knew that his plea exposed him to a twenty year to life term. Mr. Fuschino never promised petitioner any five year term; he simply expressed his opinion that petitioner could get twenty years to life or a possible reformatory sentence of five years. As the District Court observed, analytically, petitioner's claim is most analagous to a sentence prediction case where a defendant is induced to plead guilty due to an erroneous assurance of leniency made by

his counsel. Under these circumstances, there, as here, petitioner's plea was not involuntary. U.S. ex rel. LaFay v. Fritz, 455 F. 2d 297 (2d Cir. 1972); cert. den. 407 U.S. 923 (1972); U.S. ex rel. Scott v. Mancusi, 429 F. 2d 104 (2d Cir. 1970), cert. den. 402 U.S. 909; U.S. ex rel. Bullock v. Warden, 408 F. 2d 1326 (2d Cir. 1969), cert. den. 396 U.S. 1043 (1970).

There, as here, counsel was simply rendering that type of advice which it was his job to do. It must be remembered that at the time of petitioner's plea, various provisions of the Penal Law relating to reformatory terms had recently been amended (Laws of New York, 1954, Ch. 803). Although the minutes of the coram nobis hearing fail to express Mr. Fuschino's exact theory, an analysis of the amended Penal Law provisions, as well as the letter of the Director of the Elmira Reformatory to Judge Schulz, indicate that he was arguing for a sentence under former Penal Law § 2185 as it previously read so as to permit a reformatory term for males between the ages of sixteen to thirty years and not between twenty-one to thirty years as it was so limited by a 1954 amendment. He was thereby, attempting to exclude his clients from the operation of former Penal Law § 2184-a which prohibited reformatory terms if a felon faced a mandatory life imprisonment

term*. Mr. Fuschino, consistent with his obligations, was arguing for an interpretation of the statutes so as to favorably benefit his clients. As it eventually developed, Judge Schultz held that, as a matter of law, the reformatory term was unavailable. However, such circumstances does not render petitioner's plea invalid.

> "It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes that risk of ordinary error in either his or his attorney's assessment of the law and facts . . . he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not after all, a knowing and intelligent act." (Emphasis supplied) McMann v. Richardson, 397 U.S. 759, 774)

Petitioner's memorandum of law in this Court virtually sidesteps this authority as he attempts to bring himself within

*At the time of the commission of the murder, Guglielmelli was fifteen years old and petitioner was seventeen. As the letter of Director Kendall indicates, there was doubt as to whether the effective date of the amended provisions related to the date of the offense or the date of conviction. If the former, Guglielmelli and petitioner were arguably eligible for a reformatory term pursuant to former New York Penal Law § 2185.

the holdings of United States ex rel. Leeson v. Damon, 496 F. 2d 718 (2d Cir. 1974); Mosher v. United States, 491 F. 2d 1346 (2d Cir. 1974); Bye v. United States, 435 F. 2d 177 (2d Cir. 1970) and United States ex rel. Hill v. Ternullo, ____ F. 2d _____, Slip Sh.Op. 526 (2d Cir. Feb. 10, 1975).

However, contrary to the undisputed fact here that petitioner knew he faced a twenty year to life term, in both Mosher and Leeson, the Second Circuit found that the petitioners had no knowledge of the possible maximum consequences each in actuality faced and the Second Circuit accordingly held that the representation accorded Leeson and Mosher fell below constitutional standards. Moreover, insofar as petitioner contends that his attorney's representations as to a possible reformatory term deprived him of knowledge of his minimum term as enunciated in Ternullo, his argument misses the mark. In speaking of knowledge of the minimum term, the Ternullo Court meant that a defendant is entitled to have accurate information with regard to his opportunity for release prior to completion of a particular maximum term, i.e., eligibility for parole, see Bye v. Unites States, supra, and did not equate knowledge of the minimum term with knowledge of the lowest possible maximum term.

In short, petitioner pleaded guilty to murder in the second degree in order to avoid a conviction for murder in the first degree and the death peanlty. He fully appreciated that he was exposing himself to a term of twenty years to life, he made a considered and reasoned decision to plead in view of the strength of the People's case, and his attorney's attempt to have the Court impose a five year reformatory term did not render his assistance shocking so as to invalidate the plea but rather indicated a proper aim by trial counsel to minimize the penalty his client faced.*

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED

Respectfully submitted,

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State of New York
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Appellee

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*Petitioner seeks by this application the vacature of his conviction. However, even assuming arguendo that petitioner is entitled to any relief in this Court, such relief would be inappropriate. United States ex rel. Leeson v. Damon, supra.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Queene R Silverman, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for appellee herein. On the 17th day of April, 1975, She served the annexed upon the following named person :

Rosner, Fisher and Scrubner
401 Broadway
NY NY 10013

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Queene R Silverman

Sworn to before me this
17th day of April, 1975

G. Seth Greenwald
Assistant Attorney General
of the State of New York